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IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 19282
HARVEY W. DORTON,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

AN APPEAL FROM A JUDGEMENT OF GUITY FOR BAIL JUMPING, A THIRD DEGREE FELONY, ON APRIL 27, 1983, IN THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE ERNEST F. BALDWIN, JR., JUDGE PRESIDING.

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STATEMENT OF THE NATURE OF THE CASE

Appellant was charged with Bail Jumping, a third degree felony, in violation of Utah Code Ann. § 76-8-312 (1953), as amended, for failure to appear at trial while released on bail.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty as charged on April 27, 1983, in the Third Judicial District Court, the Honorable Ernest F. Baldwin, Jr., Judge, presiding. Appellant was sentenced on May 23, 1983, to serve an indeterminate term of zero to five years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks the affirmation of the judgment and sentence entered below.

STATEMENT OF FACTS

On January 1981, Appellant was charged with several First Degree Felonies: Attempted Criminal Homicide, Aggravated Burglary, Aggravated Kidnapping, Aggravated Robbery and Aggravated Sexual Assault. Appellant's trial was scheduled for February 18, 1982 (R. 87). Some time before the trial began, appellant was released on bail through Dewey's Bail Bonds (R. 99).

Appellant's trial began on February 18, as scheduled. At the end of the day, the court ordered a recess until the following morning. The court admonished all parties to return at 10:00 a.m. on February 19 (R. 87-88). Appellant failed to appear. After waiting for a period of time, the trial resumed at 1:30 p.m. on the 19th of February and concluded that same day (R. 88-89).

Nearly five months later on July 5, 1983, James R. Phelps, an employee of Dewey's Bail Bonds, located appellant at his sister's house in Houston Texas (R. 99). At that time appellant fled from Phelps. Id. Twelve hours later, still on July 5, Phelps apprehended appellant and advised him that he was under arrest for the charge of bail jumping. He also informed appellant that he had the power to place appellant under arrest under federal statutes as a bounty hunter (R. 102). Phelps accompanied appellant to the Houston Police Station where he _____ appellant (R. 101). Phelps had no conversation with appellant concerning his presence in Texas (R. 102).

Appellant was tried in Utah for Bails Jumping. During closing arguments, the County Attorney made the following comment:

> When [appellant] was arrested he gave no explanation as to what he was doing there, at least that is what Mr. Phelps told us, and there is no evidence here today that suggests that he had any legal justification for leaving (R. 123).

Appellant's counsel objected, claiming that the above was a comments on appellant's post arrest silence and on his failure to take the stand in his own behalf (R. 123, 128). The trial court admonished the jury to remember the instruction that had been given on appellant's not taking the stand. The court further stated that it's instruction was the law as it would be followed and that there would be no further argument or comment by counsel on it (R. 123). Later, counsel made a motion for mistrial based on the prosecutor's comment (R. 127). The motion was taken under advisement and later denied (R. 129).

ARGUMENT

POINT I

THE PROSECUTOR'S COMMENT CONCERNING APPELLANT'S SILENCE WHILE IN A BOUNTY HUNTER'S CUSTODY DID NOT VIOLATE APPELLANT'S FIFTH AMENDMENT RIGHTS.

Appellant correctly states the rule of Doyle v. Ohio, 426 U.S. 610 (1975), that a suspect's post arrest

silence after he has been given his Miranda rights cannot be used against the suspect in his subsequent trial. 426 U.S. at 619. This rule, however, does not apply in the present case.

The prosecutor's comment was directed specifically to appellant's silence while he was in a bail bondsman's custody (R. 123). There is no evidence on the record indicating that the bail bondsman, Mr. Phelps, gave appellant his Miranda rights, a crucial factor in Doyle. Nor is there any reason why Phelps should have done so.

Bail bondsman when making an arrest do not act as officers of the state or the courts. The bondsman, in exchange for a fee and pursuant to contract, secures the principle's release from confinement. Maynard v. Kear, 474 F.Supp. 794, 801 (N.D. Ohio, E.D. 1979). The bondsman assumes the duty of seeing that the principle appears before the court at appointed times and will incur a financial penalty for failure in that duty. Id. The bondsman may arrest the principle at any time and turn him over to the local authorities in order to avoid incurring a penalty. At common law, the power to make this arrest is "not a matter of criminal procedure, but arises from the private undertaking implied in the furnishing of the bond." Ouzts v. Maryland National Insurance Co., 505 F.2d 547, 551 (9th Cir. 1974), quoting Fitzpatrick v. Williams, 46 F.2d 40, 40-41 (5th Cir. 1931). The arrest power of the state and that of the bondsman are two distinct rights. One is based on the general police

power of the state while the other arises out of a contract between the parties. Id. Of course, the state may enter and regulate the field of bail bonds, but in so doing the state does not make the bondsman its agent. The bondsman's right to arrest does not spring initially of statute; it was created and exists primarily as a contract right. Id.

Since the bondsman is not acting as a state authority or keeper of the peace, the custody he exerts over his principle is not that required in Doyle v. Ohio, supra. The bondsman making an arrest acts in a manner analogous to a private security guard apprehending a shoplifter. At least one state court has held that prosecutorial comment on testimony of private security guards concerning a defendant's silence while in their custody is not subject to the Doyle prohibition. State v. Pickett, 37 Or. App. 239, 586 P.2d 824 (1978). A similar finding should be made regarding appellant's silence while in Mr. Phelps' custody.

Assuming arguendo, that Doyle v. Ohio, supra, applied in the present case, a trial court's judgment will not be overturned for a comment on the defendant's post arrest silence unless the comment was prejudicial to the defendant's right to a fair trial. State v. Wiswell, Utah, 639 P.2d 146, 147 (1981). The standard for prejudice is whether there was a reasonable likelihood of a more favorable outcome for the defendant in absence of the prosecution's comment. State v. Fisher, Utah, ___P.2d___, No. 18452 slip op. at 2 (March 8,

1984). The following factors usually apply: (1) to what use did the prosecution put defendant's post arrest silence; (2) Who initially elected to pursue the line of questioning or arguement; (3) What quantum of other evidence indicated defendant's guilt; (4) What was the intensity and frequency of the references to defendant's post arrest silence; (5) Did the trial judge have an opportunity to grant a motion for mistrial or to give curative instructions. Williams v. Zahradneck, 632 F.2d 353, 360-62 (4th Cir. 1980). Utah has recognized many of these factors. In State v. Wiswell, supra, a case heavily relied upon by appellant, the court granted reversal only after noting that the prosecutor had made continued attempts to bring defendant's post arrest silence to the jury's attention. Id. at 147. Furthermore, the court had neither stricken the comments by the prosecutor in his final argument nor admonished the jury not to consider those comments. Id. Finally, the court in Wiswell also noted that defendant had been advised of his right to remain silent. Id.

The facts of the present case stand in sharp contrast to those of Wiswell. First, the prosecutor made only one comment on appellant's post arrest silence in his closing argument. No comments or evidence had been made or presented during the course of trial. The single comment was objected to by appellant's counsel. The trial court immediately warned the jury not to consider appellant's silence and reminded them of the instruction given to that effect. The trial court also

admonished counsel not to comment further on the matter. The problems that resulted in reversal in Wiswell are thus not of concern in the present case and a reversal should not be granted on the grounds given in Wiswell.

Moreover, contrary to the assertions made in Point II of appellant's brief, there was ample evidence outside of the prosecutor's comment which would support the jury's finding of appellant's guilt. Appellant appeared at the first day of his trial, yet failed to make an appearance on the second day. It can be inferred that he failed to notify either the court or the bonding company. Five months later appellant was finally located in Texas by the bonding company's representative. Throughout that time appellant had not contacted the company to supply a legal justification for leaving Utah. Indeed, appellant fled from the representative when the two first met at appellant's sister's home in Texas. The only reasonable conclusion from the above facts is that appellant fled from Utah because he wished to avoid the charges filed against him and not because he had any legal justification to leave the court's jurisdiction. Indeed, the defense presented no evidence at all in its case in chief. The prosecutor's comment adds little to the above evidence or the conclusion that it supports. The comment certainly does not sustain a substantial part of the state's burden of proof as appellant claims.

In the present case, the prosecutor's comment was not naturally and necessarily directed at appellant's failure to testify. The comment was more obviously directed at the failure of the defense to present any evidence on the question of guilt or innocence. The lack of evidence shows that the question of appellant's guilt is not a close one and the prosecutor committed no error, harmless or otherwise, by informing the jury of this in his closing argument.

CONCLUSION

The rule in Doyle v. Ohio, supra, does not apply to prosecutorial comments on a defendant's silence while in the custody of a bail bondsman. Even if Doyle does apply, no error or, at most, harmless error was committed, because there was sufficient evidence of appellant's guilt without any consideration of the comment. Finally, the prosecutor did not comment on appellant's failure to testify. Rather, he commented on the general nature and quality of the evidence adduced at trial. Appellant's conviction and sentence should be affirmed.

RESPECTFULLY submitted this 14th day of June, 1984.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and exact copy of the foregoing Brief, postage prepaid to Nancy Bergeson, attorney for appellant, 333 South 2nd East, Salt Lake City, Utah 84111, this 11th day of June, 1984.

Kathleen Kellersberger